STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KINO DOMINQUE CHRISTIAN,

Defendant-Appellant.

UNPUBLISHED
September 22, 2011

No. 291578
Genesee Circuit Court
LC No. 08-022018-FC

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CQUAN MICHAEL HINTON

Defendant-Appellant.

No. 291687
Genesee Circuit Court
LC No. 08-022017-FC

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOSHUN EDWARDS,

Defendant-Appellant.

No. 291744
Genesee Circuit Court
LC No. 08-022016-FC

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DARTANION EDWARDS,

Defendant-Appellant.

No. 294871
Genesee Circuit Court
LC No. 08-022015-FC

Before: SAWYER, P.J., and DONOFRIO and RONAYNE KRAUSE, JJ.

PER CURIAM.

Following a joint trial before a single jury, defendants Kino Christian (Christian), Cquan Hinton (Hinton), Joshun Edwards (Joshun), and Dartanion Edwards (Dartanion) were each convicted of first-degree premeditated murder, MCL 750.316(1)(a), assault with intent to commit murder, MCL 750.83, carrying a concealed weapon (CCW), MCL 750.227, and possession of a firearm during the commission of a felony, MCL 750.227b. Defendants Christian and Joshun were also each convicted of felon in possession of a firearm, MCL 750.224f.

Defendant Christian was sentenced as a second habitual offender, MCL 769.10, to life imprisonment for the murder conviction and concurrent prison terms of 108 to 220 months for the assault conviction and 19 to 60 months each for the felon-in-possession and CCW convictions, to be served consecutive to a two-year term of imprisonment for the felony-firearm conviction. Defendant Hinton was sentenced to life imprisonment for the murder conviction and concurrent prison terms of 15 to 30 years for the assault conviction and one to five years for the CCW conviction, to be served consecutive to a two-year term of imprisonment for the felony-firearm conviction. Defendant Joshun was sentenced as a fourth habitual offender, MCL 769.12, to life imprisonment for the murder conviction and concurrent prison terms of 270 to 410 months for the assault conviction and two to five years each for the felon-in-possession and CCW convictions, to be served consecutive to a two-year term of imprisonment for the felony-firearm conviction. Lastly, defendant Dartanion was sentenced to life imprisonment for the murder conviction and concurrent prison terms of 171 to 324 months for the assault conviction and 19 to 60 months for the CCW conviction, to be served consecutive to a two-year term of imprisonment for the felony-firearm conviction. All four defendants appeal as of right. Their appeals have been consolidated for this Court's consideration. We affirm in each appeal.

I. FACTUAL BACKGROUND

Evidence was presented at trial that defendants Christian and Hinton approached 14-year-old Robert Person on October 9, 2007, while Person was walking with Jarylle Murphy in the vicinity of the Regency apartment complex in Flint. Christian and Hinton accused Person of being a "snitch" and threatened to "get" him for snitching. Person was still with Murphy later in the day when Murphy saw all four defendants behind them. Murphy explained that he looked

back because he is self-conscious about people being behind him. Murphy spoke to Person and then looked back at the group a second time. He saw the defendants pull out guns. Murphy ran away and heard gunshots as he was running. Person died from multiple gunshot wounds. A 7.62 by 39 millimeter fired bullet was recovered from Person's body during an autopsy.

The police later recovered a .38 caliber gun that was linked to shell casings that were found at the scene of the shooting. That gun belonged to William Harris's girlfriend, but the prosecution presented evidence that defendant Christian hid the gun behind a gas station following a different shooting incident on October 13, 2007, during which Perry Manuel was shot while operating a vehicle in which defendant Christian was a passenger. On October 16, 2007, Murphy viewed a photographic lineup and identified defendant Hinton as one of the persons in the group who shot Person. In November 2007, Murphy identified the other three defendants in photographic lineups.

Robert Moore, who was lodged in jail with defendants Christian and Joshun after they were arrested, testified at trial that defendants Christian and Joshun both told him that they had killed Person and that both sought his help in killing Murphy. Another prosecution witness, Ashlie Dye, who was familiar with defendant Christian and was in the area where Person was shot, testified that she saw defendant Christian shooting at Person.

Defense proofs indicated that three of the defendants ended up at the Terrace apartments, which is located south of the Regency apartment complex, on the night of the shooting. Defendant Dartanion presented evidence that he was with two friends when the shooting occurred, and that they eventually drove to the Terrace apartments, where Dartanion's brother Joshun told them about a boy being killed in front of the Regency apartment complex. Defendant Joshun presented evidence that he was in the parking lot at the Terrace apartments when the shooting occurred, and that he learned about the shooting from Mickey Jones, who was at the Terrace apartments. Defendant Joshun also stated that he spoke with defendant Hinton while Joshun was in the parking lot. Defendant Christian presented evidence that he was selling drugs on the night of the shooting. He testified that Manuel, Harris, and a person known as "Pooh Bear" were present, but that these individuals left with guns after receiving a telephone call. Various witnesses also testified regarding Harris and Manuel making statements about shooting Person. Jesse Mays testified that he killed Manuel, but it was determined to be a justifiable homicide. Mays testified that Manual told him approximately three weeks before he died that he had shot Person and that all four defendants were innocent.

II. PUBLIC TRIAL

Defendants Christian and Hinton both argue that their constitutional right to a public trial was violated when the trial court closed the courtroom to the public on two occasions after the jury began deliberating, first to interview a single juror and then to interview the remaining jurors, without considering reasonable alternatives to excluding the public from the courtroom. Defendant Christian also argues that his right to a public trial was violated by the exclusion of the public from the courtroom during jury voir dire.

Because neither defendant made a timely objection at trial on this ground, this issue is not preserved for appeal. To properly preserve an issue for appeal, a defendant must timely object,

even if the right asserted is constitutional in nature. *People v Carines*, 460 Mich 750, 762-763; 597 NW2d 130 (1999). Although defendant Christian raised this issue in a motion for a new trial and again in a motion for reconsideration of the trial court's decision denying the new trial motion, he does not challenge the trial court's denial of those decisions. Accordingly, our review is limited to determining whether defendant Christian or defendant Hinton have established a plain error affecting substantial rights.[1] *Id.*

This Court's decision in *People v Vaughn*, ___ Mich App ___; ___ NW2d ___ (Docket No. 292385, issued December 28, 2010), slip op at 6-7, lv pending, is dispositive of defendant Christian's and defendant Hinton's requests for relief based on the closure of the courtroom during the juror interviews. As explained in *Vaughn*, the right to a public trial is not self-executing. *Id.* The record discloses that both defendants had knowledge of the closure of the courtroom to the public and that neither defendant objected to the closure or attempted to assert his right to a public trial. Therefore, appellate relief is foreclosed. *Id.*; see also *People v Orlewicz*, ___ Mich App ___; ___ NW2d ___ (Docket No. 285672, issued June 14, 2011), slip op at 9, lv pending.

With respect to defendant Christian's argument that his right to a public trial was also violated when the trial court excluded the public from the courtroom during jury voir dire, it is not clear from the record that the public was actually excluded from trial at that stage. But even assuming that the courtroom was closed, there is nothing in the record to suggest that defendant Christian would not have had knowledge of the closure. Therefore, his failure to object and assert his right to a public trial at that stage also precludes appellate relief. *Vaughn*, ___ Mich App ___ (slip op at 6-7).

III. RIGHT TO BE PRESENT

Defendants Christian and Hinton argue that their constitutional right to be present at all critical stages of the proceeding was violated when they were excluded from the courtroom during the two occasions when the trial court interviewed the jurors after deliberations began. In neither instance, however, did defendant Christian or defendant Hinton object to their exclusion. Accordingly, this issue is unpreserved and our review is limited to plain error affecting each defendant's substantial rights. *Carines*, 460 Mich at 763.

A defendant's constitutional right to be present is rooted in the Confrontation Clause of the Sixth Amendment. *United States v Gagnon*, 470 US 522, 526; 105 S Ct 1482; 84 L Ed 2d 486 (1985). But a defendant's presence is also a condition of due process to the extent that a fair and just hearing would be thwarted by the defendant's absence. *Id.* "The right to be present at one's felony trial is one of those rights that only the defendant himself can waive." *People v Montgomery*, 64 Mich App 101, 103; 235 NW2d 75 (1975). But prejudice will not be presumed

[1] Because our review is limited to the trial court record, we decline to consider the affidavits submitted by defendant Christian in this Court in support of his motion to remand, which was denied by this Court. *People v Horn*, 279 Mich App 31, 38; 755 NW2d 212 (2008); *People v Shively*, 230 Mich App 626, 628 n 1; 584 NW2d 740 (1998).

from a defendant's absence, even where constitutional error has been shown. *People v Morgan*, 400 Mich 527, 536; 255 NW2d 603 (1977). To be entitled to relief, a defendant must demonstrate a reasonable possibility of prejudice from his absence. *Id.*

Although there is no indication that defendant Christian or defendant Hinton personally waived their right to be present, we conclude that appellate relief is not warranted because there is no reasonable possibility that either defendant was prejudiced by their absence during the brief questioning of the jurors by the trial court. In both instances, the defendants' attorneys were permitted to observe the trial court's questioning and communications with the jurors. The communications did not concern any factual or legal issue in the case. The first communication with Juror No. 11 was directed at ascertaining the factual basis for her fear of continuing with deliberations and returning a verdict. The second communication with the remaining 11 jurors occurred after the trial court determined that it was necessary to excuse Juror No. 11 for medical reasons and to replace the juror with an alternate. The second communication was limited to ascertaining whether anything had transpired that would affect the remaining jurors' abilities to be fair and impartial, and to decide the case based on the applicable law and the evidence introduced at trial. The trial court also responded to an inquiry by one juror regarding what to do with notes that the jurors had previously prepared during deliberations. None of the trial court's communications can be characterized as substantive instructions. A substantive instruction encompasses such issues as supplemental instructions on the law. *People v France*, 436 Mich 138, 143; 461 NW2d 621 (1990). The trial court's response to the juror's inquiry did not concern the law or the facts of the case, but rather how the remaining 11 jurors should proceed with the alternate juror. The response is more analogous to an instruction encouraging jurors to continue deliberations, which is administrative in nature. *Id.*

We also reject defendants' suggestions that the trial court's communications with the jurors constituted improper ex parte communications. "The reference to and understanding of 'ex parte' generally entails direct communications or meetings of which neither the defendant nor his counsel was informed or had an opportunity to participate or waive defendant's appearance." *Pellington v Greiner*, 307 F Supp 2d 601, 606 (SD NY, 2004). Because defendants' attorneys were able to observe all of the communications, they were not ex parte in nature. The presence of counsel in this manner was sufficient to protect defendant Christian's and defendant Hinton's interests.

Based on the whole record, we conclude that defendant Christian's and defendant Hinton's brief absence during the trial court's questioning of the jurors, with counsel able to observe the procedure, did not thwart their right to a fair trial. *Gagnon*, 470 US at 526-527. Neither defendant has established a reasonable possibility of prejudice arising from his absence. *Morgan*, 400 Mich at 536. Therefore, defendants have not established a plain error affecting their substantial rights. *Carines*, 460 Mich at 763.

Defendant Christian also argues that his exclusion from the courtroom during the trial court's questioning of the jurors violated MCL 768.3, which provides that "[n]o person indicted for a felony shall be tried unless personally present during the trial." This statutory right to be present is not absolute. *People v Krueger*, 466 Mich 50, 54 n 9; 643 NW2d 223 (2002). Even if there were a statutory violation, defendant Christian's failure to demonstrate prejudice precludes relief for this unpreserved claim of error. *Carines*, 460 Mich at 763. Similarly, defendants'

inability to demonstrate prejudice also precludes relief for any violation of MCR 6.414(B), which prohibits a trial court from communicating with the jury "without notifying the parties and permitting them to be present." *France,* 436 Mich at 142; *Carines,* 460 Mich at 763.

IV. MOTIONS FOR MISTRIAL

A. JUROR NO. 11

Defendants Christian and Hinton challenge the trial court's decision to replace Juror No. 11 with an alternate juror instead of granting their respective motions for a mistrial. We review a trial court's decision to deny a motion for a mistrial for an abuse of discretion. *People v Dennis,* 464 Mich 567, 572; 628 NW2d 502 (2001); *People v Waclawski,* 286 Mich App 634, 708; 780 NW2d 321 (2009). "An abuse of discretion occurs when the court chooses an outcome that falls outside the range of reasonable and principled outcomes." *People v Unger,* 278 Mich App 210, 217; 749 NW2d 272 (2008). A mistrial should only be granted for an irregularity that prejudices the defendant's rights and impairs his ability to receive a fair trial. *People v Bauder,* 269 Mich App 174, 195; 712 NW2d 506 (2005).

We disagree with defendants Christian and Hinton that the jury's notes describing Juror No. 11's fears for her safety and refusal to participate in rendering a verdict because of those fears demonstrate the existence of an extraneous influence on the remaining jurors sufficient to warrant a mistrial. A defendant seeking reversal on the ground that a jury was exposed to extrinsic influences bears the initial burden of establishing that (1) the jury was exposed to extraneous influences, and (2) a real and substantial possibility that the extraneous influences could have affected the jury verdict. *People v Budzyn,* 456 Mich 77, 89; 566 NW2d 229 (1997). Whether extrinsic influences could have affected a jury's verdict is an objective inquiry. *Id.* at 89 n 10.

A juror's subjective fear originating from the trial evidence, and not from some extrinsic source, is intrinsic to the trial. *United States v King,* 627 F3d 641, 650-651 (CA 7, 2010); *Garcia v Andrews,* 488 F3d 370, 376 (CA 7, 2007). There was no evidence that Juror No. 11's subjective expressions of fear for her safety resulted from some extraneous source. Thus, defendants Christian and Hinton have not satisfied the first requirement under *Budzyn*. Furthermore, even if Juror No. 11's expressions of fear could be considered an extraneous influence on the other jurors, there is no real and substantial possibility that it affected the jury's verdict. The jurors were questioned by the trial court and no response was received when the court asked the jurors if they heard or saw anything that would affect their ability to be fair and impartial, or to decide the case based only on the evidence. Further, one would have expected the jurors to vote for acquittal, or to not vote at all, if they were affected by Juror No. 11's expressions of fear. Given defendants' failure to demonstrate a real and substantial possibility that Juror No. 11's expressions of fear affected the verdict, the trial court did not abuse its discretion in denying their motion for a mistrial. Defendants were not deprived of their right to a fair and impartial jury.

B. REFERENCE TO POLYGRAPH TEST

Defendants Hinton, Joshun, and Dartanion, all argue that the trial court erred in denying their motion for a mistrial after Moore testified during direct examination by the prosecutor that defendant Joshun told him that he and defendant Dartanion had flunked a lie detector test.[2] Defendant Christian raises this same argument in a pro se Standard 4 brief.[3]

It is well established that evidence relating to a polygraph examination is inadmissible at trial. *People v Jones*, 468 Mich 345, 355; 662 NW2d 376 (2003). But not all references to a polygraph examination at a trial require a new trial. *Id.* at 356-357; *People v Kahley*, 277 Mich App 182, 183-184; 744 NW2d 194 (2007). Relevant factors to consider in determining whether a new trial is required include whether the defendant objected or sought a cautionary instruction, whether the reference to the polygraph examination was inadvertent and repeated, whether an attempt was being made to bolster witness credibility, and whether the results of the test were disclosed. *People v Nash*, 244 Mich App 93, 98; 625 NW2d 87 (2000). See also *People v Terry*, ___ Mich ___; ___ NW2d ___ (No 141983, decided May 6, 2011) (contrasting a volunteered statement by a witness regarding a polygraph and deliberate elicitation by the prosecutor).

Here, the trial court considered these factors in its decision to deny the motion for a mistrial. It noted that there was no objection at the time of the remark, but found that a motion for a mistrial was made as soon as practical. It also found that the prosecutor did not intentionally elicit the reference, nor was she improperly trying to bolster Moore's credibility when the reference was made. The record supports these findings. The reference was made when responding to a question that merely asked Moore to relate his conversation with defendant Joshun. The question was not calculated to elicit Moore's reference to a polygraph. Further, there is no support for defendant Joshun's claim on appeal that Moore was "coached" into making the improper reference. The record also supports the trial court's finding that there was no suggestion that Moore was trying to booster his own credibility. As the trial court observed, Moore "hadn't even been cross-examined yet, and there were no repeated efforts at rehabilitation." And although Moore's response revealed the results of Joshun's and Dartanion's lie detector tests, the improper reference was isolated and not repeated. The trial court later gave a cautionary instruction advising the jury that lie detector tests are unreliable and that it was to "disregard any references by this witness to any alleged lie detector or polygraph examination and you are to draw no conclusions whatsoever from his comments."[4] Jurors are presumed to

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[2] In considering this issue, we decline to consider the actual polygraph results that defendant Joshun has submitted with his reply brief. That evidence was not presented below and a party may not expand the record on appeal. MCR 7.210(A)(1); *Shively*, 230 Mich App at 628 n 1.

[3] Filed pursuant to Supreme Court Administrative Order No. 2004-6, Standard 4.

[4] Although defendant Joshun asserts that the instruction merely served to remind the jury of the improper testimony, the record reflects that his trial attorney expressly informed the court that he wanted a cautionary instruction given, and that all four defendants expressed their approval to the court's giving a cautionary instruction.

follow their instructions and "instructions are presumed to cure most errors." *Bauder*, 269 Mich App at 195.

Considering all the circumstances, the trial court's decision to give a cautionary instruction and deny the motion for a mistrial was a reasonable and principled decision. Accordingly, the court did not abuse its discretion in denying defendants' motion for a mistrial. *Unger*, 278 Mich App at 217.

V. IMPEACHMENT EVIDENCE

Defendants Christian, Joshun, and Dartanion all argue that the prosecutor engaged in misconduct by eliciting testimony from two prosecution witnesses, Marcus Turner and Tobias Gatewood, concerning their alleged prior statements to Flint Police Sergeant Leeann Gaspar, and by later presenting Sergeant Gaspar's testimony to establish the prior statements. Because none of the defendants objected to the prosecutor's challenged conduct at trial, this issue is unpreserved and our review is limited to plain error affecting defendants' substantial rights. *Carines*, 460 Mich at 763; *People v Schutte*, 240 Mich App 713, 720; 613 NW2d 370 (2000), abrogated on other grounds in *Crawford v Washington*, 541 US 36; 124 S Ct 1354; 158 L Ed 2d 177 (2004).

The general test for prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *People v Fyda*, 288 Mich App 446, 460; 793 NW2d 712 (2010); *People v Brown*, 279 Mich App 116, 134; 755 NW2d 664 (2008). "A prosecutor's good-faith effort to admit evidence does not constitute misconduct." *People v Dobek*, 274 Mich App 58, 70; 732 NW2d 546 (2007). Further, not all claims of prosecutorial misconduct are constitutional in nature, and evidentiary errors are generally nonconstitutional. *People v Blackmon*, 280 Mich App 253, 259; 761 NW2d 172 (2008). "Where there is no allegation that prosecutorial misconduct violated a specific constitutional right, a court must determine whether the error so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Id.* at 262.

There is no basis for concluding that the prosecutor acted in bad faith by introducing the testimony regarding Turner's and Gatewood's prior statements. It is true that "a prosecutor may not use an elicited denial as a springboard for introducing substantive evidence under the guise of rebutting the denial." *People v Stanaway*, 446 Mich 643, 693; 521 NW2d 557 (1994). It is also improper for a prosecutor to elicit a denial from a witness as a means of introducing a statement that would otherwise be inadmissible hearsay. *Id.* at 693. But evidence of a prior inconsistent statement may be used to impeach a witness, even if it tends to directly inculpate the defendant. *People v Kilbourn*, 454 Mich 677, 682; 563 NW2d 669 (1997). "The purpose of extrinsic impeachment evidence is to prove that a witness made a prior inconsistent statement—not to prove the contents of the statement." *People v Jenkins*, 450 Mich 249, 256; 537 NW2d 828 (1995). Impeachment is improper where "(1) the substance of the statement purportedly used to impeach the credibility of the witness is relevant to the central issue of the case, and (2) there is no other testimony from the witness for which his credibility was relevant to the case." *Kilbourn*, 454 Mich at 683.

In this case, Turner was a jail inmate when he gave his alleged statement to Sergeant Gaspar. Although he denied on direct examination by the prosecutor that he ever spoke to Sergeant Gaspar, or that he had any knowledge of this case, the substance of his alleged statement, as testified to by Sergeant Gaspar, was relevant to the central issue in the case because part of his statement indicated that he witnessed the shooting. According to Sergeant Gaspar, Turner initially indicated that "Will" and "Perry" committed the shooting. When asked if he was lying, Turner told Sergeant Gaspar that defendant Joshun had asked him to make up the story and that he actually witnessed the shooting. Turner also stated that he witnessed "Kino" participate in the shooting with "Joshun" and "Cquan," and that "Dartanion" was also with them, although Turner did not know if "Dartanion" did any shooting.

Gatewood was also a jail inmate at the time of his alleged statement to Sergeant Gaspar. Unlike Turner, Gatewood did not deny having any discussion with Sergeant Gaspar. But the substance of Gatewood's statement was also relevant to the central issue in the case because it concerned the identity of the shooters. Gatewood testified that he did not tell Sergeant Gaspar that defendant Dartanion told him before the shooting to "keep his family clear because they were going to take care of some business" or that defendant Dartanion told him after the shooting that he, "Kino," and "Little Mike" did the shooting. At the same time, Gatewood testified that he executed an affidavit that defendant Joshun also signed in which he indicated that his prior statement to Sergeant Gaspar regarding what Dartanion told him was false.

Although the substance of the alleged prior statements by Turner and Gatewood was relevant to the central issue in the case concerning the identity of the persons involved in the shooting, the trial court repeatedly instructed the jury during Sergeant Gaspar's testimony that the prior statements could not be used for substantive purposes. During its final instructions after closing arguments, the trial court repeated its instruction that the prior inconsistent statements could not be used as evidence that what the witnesses said was true. Further, as the trial court observed when denying defendant Christian's motion for a new trial, Turner's and Gatewood's testimony had some relevancy apart from the prior statements for which their credibility was relevant, because it had a bearing on Sergeant Gaspar's investigation, which defendants had attacked as inadequate.[5]

A prosecutor may fairly respond to an issue raised by the defendant. *Brown*, 279 Mich App at 135. Examining the record as a whole, the prosecutor's direct examination of Turner and Gatewood, and her questioning of Sergeant Gaspar, regarding Turner's and Gatewood's prior statements was not plain error.

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[5] Defendant Christian's counsel asserted in closing argument that "once [Sergeant Gaspar] locked on to these four guys, if what she heard didn't support her theory, she ignored it." Defendant Joshun's counsel similarly argued, "I think that this case was bungled. I think that there was a rush to judgment." Defendant Dartanion's counsel argued that it is "your job to tell that detective that that's not good enough, that that's not going to convince you beyond a reasonable doubt that they have done everything they can to investigate this case. It's just almost ludicrous."

Defendant Christian's and defendant Dartanion's reliance on the prosecutor's closing argument, and defendant Joshun's reliance on the prosecutor's rebuttal argument, to argue that the prosecutor used the evidence for substantive purposes is misplaced. "Prosecutorial comments must be read as a whole and evaluated in light of defense arguments and the relationship they bear to the evidence admitted at trial." *Brown*, 279 Mich App at 135. Examined as a whole, the record indicates that the prosecutor was attempting to summarize the testimony of various witnesses, including Turner and Gatewood, in her closing argument. The prosecutor did not suggest that the testimony should be used for substantive purposes. Rather, she argued that the jury would be taking the evidence and matching it with the law provided by the trial court. In addition, it is apparent that the prosecutor's rebuttal argument was directed at rebutting the defense claims that Sergeant Gaspar did not conduct an adequate investigation, and not to suggest that Turner's and Gatewood's statements could be used for substantive purposes. Because a prosecutor may fairly respond to an issue raised by a defendant, we find no plain error. *Id.*

Furthermore, we are not persuaded that the evidence elicited by the prosecutor, or the prosecutor's arguments regarding the evidence, affected the outcome of the proceeding. *Jones*, 468 Mich at 356; *Carines*, 460 Mich at 763. While this case presented credibility issues with respect to each defendant, it is distinguishable from *Stanaway*, 446 Mich App at 695, which essentially involved a credibility contest between the defendant and a criminal sexual conduct complainant. In *Stanaway*, the Supreme Court found that a police officer's testimony that the defendant's nephew said that the defendant had sex with a young girl was error that could not have been cured by a cautionary instruction. *Id.* at 693-695. Here, the evidence regarding the prior statements itself contained inconsistencies. According to Sergeant Gaspar, Turner's initiation information was that "Will" and "Perry" did the shooting. Further, Gatewood executed an affidavit to recant statements that, according to his trial testimony, were never made. Considering the evidence as a whole and the limiting instructions that were repeatedly given by the trial court, it cannot be said that the inconsistencies brought out through evidence of the prior statements by Turner and Gatewood were outcome determinative. Under the circumstances of this case, we may presume that the jury followed the trial court's repeated instructions that precluded substantive use of the prior statements. *Bauder*, 269 Mich App at 195.

VI. OPINION TESTIMONY

Defendants Hinton and Dartanion both argue that the trial court erroneously permitted Sergeant Gaspar to offer her opinion whether a witness provided information that was consistent with her investigation and whether she believed that she had identified the right suspects. Defendant Christian raises this same argument in his Standard 4 brief.

These defendants first challenge the trial court's decision to allow Sergeant Gaspar's rebuttal testimony that Harris told her things during an interview in August 2008 that matched physical evidence that she had already collected. This issue was preserved through the objections by defendants Hinton and Joshun. Although defendants Christian and Dartanion did not join in the objections, we shall treat their claims as preserved because the matter was addressed and decided by the trial court and the court's evidentiary ruling affected all defendants. *People v Griffin*, 235 Mich App 27, 41 n 4; 597 NW2d 176 (1999), overruled in part on other grounds *People v Thompson*, 477 Mich 146; 730 NW2d 708 (2007); see also *People v*

Brown, 38 Mich App 69, 75; 195 NW2d 806 (1972). We review a preserved evidentiary ruling for an abuse of discretion. *Unger*, 278 Mich App at 216. "An abuse of discretion occurs when the court chooses an outcome that falls outside the range of reasonable and principled outcomes." *Id.* at 217.

The test for rebuttal evidence is "whether the evidence is properly responsive to evidence introduced or a theory developed by the defendant." *People v Figgures*, 451 Mich 390, 399; 547 NW2d 673 (1996). In addition, MRE 701 allows a lay witness to testify in the form of an opinion or inference that is "(a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue." See also *People v Yost*, 278 Mich App 341, 358; 749 NW2d 753 (2008).

Given the defense attacks on the adequacy of Sergeant Gaspar's investigation, the trial court did not abuse its discretion in allowing her to testify on rebuttal that Harris's statements matched the physical evidence. Although defendants correctly observe that it is generally improper for a witness to comment on the credibility of another witness, *People v Smith*, 158 Mich App 220, 230-231; 405 NW2d 156 (1987), Sergeant Gaspar was not asked to provide an opinion on the credibility of any other witness. She was only asked whether information that she received from Harris was consistent with other evidence that she had already collected. The trial court cautioned the jury that it was to "make its own determination whether or not there is a match." Under these circumstances, the trial court did not abuse its discretion in allowing the testimony.

Defendants Hinton, Dartanion, and Christian also challenge the trial court's decision to overrule their objections to the prosecutor's question to Sergeant Gaspar whether "at some point in time were you confident that you had the right individuals for the homicide of Robert Persons." Although the trial court overruled defendants' objections to the question, the record fails to disclose that Sergeant Gaspar provided a response to the question. The question was interrupted by a series of defense objections before an answer was given. After the trial court overruled the defense objections, the prosecutor resumed her questioning on another subject, without a response having been given to the challenged question. The jury was instructed that the lawyers' statements and questions were not evidence. In light of this instruction, and the absence of any response to the prosecutor's question, any error in overruling the defense objections was clearly harmless. *People v Lukity*, 460 Mich 484, 494-495; 596 NW2d 607 (1999). The trial court's ruling does not undermine the reliability of the verdict.[6] *People v Whittaker*, 465 Mich 422, 427; 635 NW2d 687 (2001).

[6] We note that defendant Christian's counsel later elicited an affirmative response from Sergeant Gaspar that she was confident that the four defendants were responsible for the charged crime. However, this response was given in the context of questioning in which Sergeant Gaspar admitted that she did not pursue DNA testing of other suspects despite the discovery on a gun linked to the shooting of DNA that did not match any of the defendants. The defensive use of this testimony to attempt to show that Sergeant Gaspar was not willing to change her views of

VII. DEFENDANT CHRISTIAN'S OTHER ISSUES

Defendant Christian argues that trial counsel was ineffective for failing to object to (1) the public's exclusion from the courtroom during jury voir dire and the court's juror interviews, (2) defendant Christian's exclusion from the courtroom during the juror interviews, or at least his inability to view the trial court's interviews of the jurors, and (3) the evidence and prosecutorial arguments pertaining to Turner's and Gatewood's prior statements.

Defendant Christian preserved this issue by moving for a new trial based on ineffective assistance of counsel. *People v Plummer*, 229 Mich App 293, 308; 581 NW2d 753 (1998). But because no *Ginther*[7] hearing was held in the trial court, our review is limited to errors apparent from the record. *People v Horn*, 279 Mich App 31, 38; 755 NW2d 212 (2008); *People v Jordan*, 275 Mich App 659, 667; 739 NW2d 706 (2007); *People v Wilson*, 242 Mich App 350, 352; 619 NW2d 413 (2000). Ineffective assistance of counsel is a mixed question of fact and constitutional law. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). The defendant bears the burden of demonstrating that "counsel's performance was deficient in that it fell below an objective standard of professional reasonableness, and that it is reasonably probable that, but for counsel's ineffective assistance, the result of the proceeding would have been different." *Jordan*, 275 Mich App at 667. The defendant must overcome a strong presumption that counsel engaged in sound trial strategy. *Id.* at 667-668.

Defendant Christian has failed to overcome the presumption that trial counsel's decisions pertaining to any exclusion of the public from the courtroom constituted sound trial strategy. See *Vaughn*, ___ Mich App at ___ (slip op at 8). In addition, defendant Christian's failure to demonstrate prejudice is dispositive of his second ineffective assistance of counsel claim. As explained previously, defendant Christian has not shown any reasonable probability that he was prejudiced by his exclusion from the courtroom during the trial court's brief questioning of the jurors. It follows that defendant Christian cannot demonstrate that he was prejudiced by counsel's failure to object to this exclusion. *Jordan*, 275 Mich App at 667.

With respect to defendant Christian's third claim, defense counsel's reasons, if any, for not objecting to the prosecutor's eliciting testimony from Turner and Gatewood regarding the substance of their prior statements are not apparent from the record. Counsel may have concluded, as the trial court ultimately determined when it denied defendant Christian's motion for a new trial, that the testimony was reduced to a "non-event." Counsel also may have determined that raising questions about the credibility of testimony by jail inmates would have some benefit, especially when another jail inmate, Moore, offered testimony regarding defendant Christian's own statements that linked him to the shooting. Trial counsel's reasons for not objecting to the substance of Sergeant Gaspar's testimony regarding the content of Turner's and Gatewood's statements also are not apparent from the record. It is clear, however, that the parties understood, and that the jury was instructed, that the statements were not admissible for a substantive purpose. In addition, as discussed in part V of this opinion, the testimony was

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the case in the face of evidence that allegedly pointed to someone else demonstrates that the prosecutor's question was not unduly prejudicial.

[7] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

ultimately relevant to Sergeant Gaspar's investigative measures, which had been attacked by defendants. But even assuming that trial counsel's failure to object on the basis of improper impeachment fell below an objective standard of reasonableness, defendant Christian has not met his burden of showing a reasonable probability that, but for counsel's failure to object, the result of the proceeding would have been different. As discussed in part V of this opinion, we may presume that the jury followed the trial court's instructions that the evidence was not to be considered for its substance.

We also reject defendant Christian's related argument that trial counsel was ineffective for failing to object to the prosecutor's closing argument regarding this evidence, because, as discussed in part V of this opinion, the record does not support his position that the prosecutor used the evidence for a substantive purpose.

Next, defendant Christian argues in his Standard 4 brief that his Sixth Amendment right of confrontation was violated when the trial court refused to allow a recording of Moore's conversations with himself and with defendant Joshun to be played at trial. Because defendant Christian did not raise this constitutional issue in the trial court, the issue is not preserved and our review is limited to plain error affecting substantial rights. *Carines*, 460 Mich at 763; see also *People v Kimble*, 470 Mich 305, 309; 684 NW2d 669 (2004) ("objection based on one ground is usually considered insufficient to preserve an appellate attack based on a different ground").

"A primary interest secured by the Confrontation Clause is the right of cross-examination." *People v Adamski*, 198 Mich App 133, 138; 497 NW2d 546 (1993). While the extent of cross-examination is within the trial court's discretion, the Confrontation Clause guarantees a defendant a reasonable opportunity to test the truth of a witness's testimony. *People v Hackett*, 421 Mich 338, 347; 365 NW2d 120 (1984). A limitation on cross-examination that prevents a defendant from placing before the jury facts from which a lack of credibility may be inferred constitutes a denial of the right of confrontation. *People v Cunningham*, 215 Mich App 652, 657; 546 NW2d 715 (1996). But the right of cross-examination does not include the right to cross-examine a witness on irrelevant issues and "may bow to accommodate other legitimate interests of the trial process of society." *Id.*; *Adamski*, 198 Mich App at 138.

Here, the record does not disclose that any limitations were placed on counsel's cross-examination of Moore relative to the recorded conversations. A witness may be impeached with a recorded statement. *People v Donald*, 103 Mich App 613, 617; 303 NW2d 247 (1981). But there is no indication in the record that defendant Christian desired to play the recorded conversations to Moore during cross-examination so that he could hear the problems with the quality of the recording or to otherwise give him an opportunity to explain why statements he claimed should have been recorded did not appear on the recording. Rather, counsel sought to have the recording played after Moore's testimony concluded. Given this record, defendant Christian has not established a plain violation of his confrontation rights.

We also reject defendant Christian's unpreserved claim that his right to present a defense was violated because trial counsel was denied an opportunity to play Moore's recorded conversations. The due process right to present a defense is not absolute. *People v Hayes*, 421 Mich 271, 279; 364 NW2d 635 (1984). "The accused must still comply with 'established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of

guilt and innocence.'" *Id.* at 279, quoting *Chambers v Mississippi*, 410 US 284, 302; 93 S Ct 1938; 35 L Ed 2d 297 (1973). A defendant's interest in presenting evidence may bow to other legitimate interests in the trial process. *Unger*, 278 Mich App at 250.

MRE 611(a) allowed the trial court to exercise reasonable control over the mode and order of presenting evidence to avoid the needless consumption of time. A trial court has discretion in fulfilling its duties in matters of trial conduct. *People v Green*, 34 Mich App 149, 152; 190 NW2d 686 (1971). Here, it was not unreasonable for the trial court to admit the recorded conversations, but leave it to counsel to argue to the jury that it should listen to the recorded conversations during deliberations. The court's ruling did not deprive defendant Christian of his right to present a defense.

We also find no merit to defendant Christian's argument that the trial court's decision to allow counsel to direct the jury to the relevant parts of the recorded conversations during closing argument deprived defendant Christian of his Sixth Amendment right to counsel. Defendant Christian's reliance on *Bell v Cone*, 535 US 685, 695-696; 122 S Ct 1843; 152 L Ed 2d 914 (2002), is misplaced because he was not completely denied his right to counsel at a critical stage. While the preclusion of closing argument constitutes a denial of the effective assistance of counsel, *People v Thomas*, 390 Mich 93; 210 NW2d 776 (1973), the trial court's discretionary authority over the conduct of trial includes the authority to limit counsel's arguments. See *Green*, 34 Mich App at 152. Defendant Christian has failed to establish any constitutional error.

In a related issue, defendant Christian argues that the trial court erred in admitting the transcript of Moore's recorded conversations without verifying the accuracy of the transcript. Defendant Christian also submits that the recording itself was unreliable. While the record discloses that there were problems with the audible quality of the recorded conversations, the transcript prepared by the certified reporter reflects that parts of the recorded conversations were inaudible and that not all speakers were identified. Nonetheless, because defendant Christian affirmatively represented that he had no objection to the introduction of the transcript, this claim of error has been waived. *People v Carter*, 462 Mich 206, 215-216; 612 NW2d 144 (2000).

Lastly, defendant Christian argues in his Standard 4 brief that the trial court erred in instructing the jury on flight, which permitted the jury to infer defendant Christian's consciousness of guilt. Although defendant Christian argues that there was no evidence to support the instruction, he did not present that argument when discussing the jury instructions at trial. Rather, he argued that the evidence that would support a flight instruction with respect to his circumstances would equally apply to the other defendants. In addition, on at least two separate occasions after the trial court gave the flight instruction, defendant Christian's counsel stated that he had no objections to the instructions. "Counsel's affirmative expression of satisfaction with the trial court's jury instruction waived any error." *People v Chapo*, 283 Mich App 360, 372-373; 770 NW2d 68 (2009). Accordingly, there is no error to review. *People v Lueth*, 253 Mich App 670, 688; 660 NW2d 322 (2002).

VIII. DEFENDANT HINTON'S OTHER ISSUES

Defendant Hinton argues that trial counsel was ineffective for failing to object to Turner's and Gatewood's testimony, Sergeant Gaspar's testimony regarding Turner's and

Gatewood's prior statements, and the prosecutor's closing and rebuttal arguments regarding that evidence. Because defendant Hinton did not raise this issue in the trial court, our review is limited to errors apparent from the record. *Horn*, 279 Mich App at 38.

We concluded in part V of this opinion that the prosecutor did not engage in misconduct by eliciting the challenged testimony, or by commenting on that testimony during closing argument. Further, in part VII of this opinion, we rejected defendant Christian's claim that his counsel was ineffective for failing to object to the testimony or the prosecutor's arguments referring to the testimony. For the same reasons, we reach the same conclusion here with respect to defendant Hinton. Even assuming that defendant Hinton's counsel's failure to object could be considered objectively unreasonable, defendant Hinton has not met his burden of showing a reasonable probability that, but for counsel's failure to object, the result of the proceeding would have been different.

Defendant Hinton also argues that trial counsel was ineffective for failing to call Joanna Tedford as an alibi witness at trial.[8] A defense attorney's failure to call a witness can constitute ineffective assistance of counsel only where it deprives the defendant of a substantial defense. *People v Payne*, 285 Mich App 181, 190; 774 NW2d 714 (2009). A substantial defense is one that might have made a difference in the outcome of the trial. *In re Ayres*, 239 Mich App 8, 22; 608 NW2d 132 (1999). Here, the record reflects that trial counsel filed a pretrial notice of alibi, which indicated that defendant Hinton would claim that he was with Tedford at the time of the shooting. In addition, it appears that counsel contemplated calling Tedford at trial because her name was mentioned as a potential witness during jury voir dire. During closing argument, defendant Hinton's counsel commented that Tedford "didn't come in," but stated that there was other evidence, including the testimony of Mickey Jones and defendant Joshun, to establish defendant Hinton's alibi.

A defendant has the burden of establishing the factual predicate for his claim of ineffective assistance of counsel. *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001). Here, the record discloses that defendant Hinton's counsel was aware of Tedford's status as a potential alibi witness, and contemplated calling her at trial, but does not disclose why Tedford was not called, or what steps trial counsel may have taken to obtain Tedford's appearance. The limited record presented is insufficient to conclude that the failure to call Tedford at trial was due to some deficiency on the part of trial counsel. See *People v Rockey*, 237 Mich App 74, 77; 601 NW2d 887 (1999).

Furthermore, because there is no record of Tedford's proposed testimony, defendant Hinton cannot establish that the failure to call Tedford deprived him of a substantial defense. Even assuming that she would have testified consistently with Mickey Jones and defendant Joshun, "[t]he number of witnesses a party garners is quite irrelevant in determining where the truth lies." *People v Hagle*, 67 Mich App 608, 617; 242 NW2d 27 (1976). "[T]he presentation

[8] In considering this issue, we do not consider Tedford's affidavit that defendant Hinton has submitted with his brief on appeal because the affidavit is not part of the lower court record. *Horn*, 279 Mich App at 38; *Shively*, 230 Mich App at 628 n 1.

of only one witness has the advantage of eliminating the possibility of distracting inconsistencies." *Carbin*, 463 Mich at 604. Because the apparent subject matter of Tedford's testimony was supplied by other witnesses, it is not apparent that the failure to call Tedford was either objectively unreasonable or prejudicial. The failure to call Tedford did not deprive defendant Hinton of a substantial defense. Accordingly, this ineffective assistance of counsel claim cannot succeed.

Defendant Hinton also argues that trial counsel failed to adequately investigate the case or interview potential witnesses. "A defendant is entitled to have his counsel prepare, investigate, and present all substantial defenses." *In re Ayres*, 239 Mich App at 22. Here, however, defendant Hinton has not established any factual support for his claim. Therefore, this ineffective assistance of counsel claim also cannot succeed. *Carbin*, 463 Mich at 600.

Defendant Hinton also makes a cursory argument that trial counsel should have called an expert witness to testify about "measurements" involved in the case. Because there is no record of the proposed expert testimony that defendant Hinton claims should have been presented, there is no factual basis for concluding that the failure to call an expert deprived defendant Hinton of a substantial defense. Therefore, this claim also fails.

Defendant Hinton also argues that trial counsel was ineffective for failing to object to the closure of the courtroom during jury selection, and for failing to object to defendant Hinton's absence during the trial court's questioning of Juror No. 11. We rejected these same claims by defendant Christian in part VII of this opinion. We similarly conclude here that defendant Hinton has not overcome the presumption that counsel's decisions pertaining to any exclusion of the public from the courtroom constituted sound trial strategy, see *Vaughn*, ___ Mich App at ___ (slip op at 8), and that defendant Hinton's inability to show any reasonable probability that he was prejudiced by his exclusion from the courtroom during the trial court's brief questioning of the jurors precludes relief under an ineffective assistance of counsel theory of relief.

IX. DEFENDANT JOSHUN EDWARDS'S OTHER ISSUES

Defendant Joshun argues that reversal is required because the prosecutor engaged in misconduct by eliciting testimony from Moore that defendant Joshun was on parole. Because there was no objection to the testimony at trial, this issue is unpreserved and our review is limited to plain error affecting defendant Joshun's substantial rights. *Brown*, 279 Mich App at 134; *Schutte*, 240 Mich App at 720. As defendant Joshun observes, this Court has reversed convictions in other cases in which prejudicial testimony concerning a defendant's criminal background was deliberately elicited by a prosecutor, or the prosecutor should have anticipated the testimony. See *People v Spencer*, 130 Mich App 527, 536-537, 543; 343 NW2d 607 (1983), *People v Springs*, 101 Mich App 118, 121-124; 300 NW2d 315 (1980), and *People v McGee*, 90 Mich App 115, 116-117; 282 NW2d 250 (1979). In this case, however, it is not apparent from the record that Moore's testimony referring to defendant Joshun's parole status was deliberately elicited or should have been anticipated. Further, there is no basis for concluding that defendant Joshun was prejudiced by the isolated reference. The jury was already aware that defendant Joshun had a prior felony conviction because he stipulated that he had a prior felony conviction for purposes of the felon in possession of a firearm charge. See *People v Holmes*, 98 Mich App 369, 379; 295 NW2d 887 (1980), vacated in part on other grounds 417 Mich 960 (1983).

Accordingly, defendant Joshun has failed to establish a plain error affecting his substantial rights. *Carines*, 460 Mich at 763, *Brown*, 279 Mich App at 134.

Next, defendant Joshun argues that his Sixth Amendment right to counsel was violated when government officials outfitted Moore with a recording device to record his conversations with defendant Joshun. Defendant Joshun argues that all evidence obtained as a result of the recorded conversations should have been suppressed. Because there was no objection to the evidence on this basis at trial, this issue is not preserved and our review is limited to plain error affecting defendant Joshun's substantial rights. *Carines*, 460 Mich at 763.

An accused's Sixth Amendment right to counsel may be violated when a governmental agent deliberately elicits incriminating statements from an accused after an indictment. *United States v Henry*, 447 US 264, 270; 100 S Ct 2183; 65 L Ed 2d 115 (1980). While incriminating statements that violate the Sixth Amendment right to counsel are inadmissible even if the police are also investigating other crimes, incriminating statements pertaining to other crimes for which the Sixth Amendment right had not yet attached are admissible. *Maine v Moulton*, 474 US 159, 179-180; 106 S Ct 477; 88 L Ed 2d 481 (1985). The primary concern is the existence of secret interrogation by investigatory techniques that are equivalent to direct police interrogation. *Kuhlmann v Wilson*, 477 US 436, 459; 106 S Ct 2616; 91 L Ed 2d 364 (1986).

Here, it is unclear from the record whether Moore used techniques equivalent to direct police interrogation while wearing the recording device. Even if there was plain error, however, defendant Joshun has not established that his substantial rights were affected. Defendant Joshun has not established any basis for excluding Moore's testimony regarding his initial conversations with defendant Joshun, before Moore began wearing the recording device. Moore testified that both defendant Christian and defendant Joshun told him before he began wearing the recording device that they had killed Person. They had also asked him to kill Murphy. Moore also claimed that defendant Joshun again admitted committing the charged crime during the recorded conversations, but Joshun's counsel elicited that no such statement appeared in the recording or the transcript, and he urged the jury to examine those items for itself. Counsel argued that Moore was "making it up" and asserted that the evidence of the recordings would show that "Moore is the one trying to get everyone to pay him to do anything." Because the record indicates that defendant Joshun used the challenged evidence for a defensive purpose, to attack the credibility of Moore's testimony regarding what defendant Joshun told him before he began wearing the recording device, defendant Joshun's substantial rights were not affected by the alleged error.

Defendant Joshun's related ineffective assistance of counsel claim also cannot succeed. The absence of a plain error and the defensive use of the evidence to attack Moore's credibility precludes defendant Joshun from establishing that defense counsel's failure to object to the evidence was objectively unreasonable. Furthermore, because the evidence was used to aid the defense arguments that Moore's testimony concerning his earlier conversations with defendants Joshun and Christian was not credible, defendant Joshun has failed to establish that he was prejudiced by the evidence. *Jordan*, 275 Mich App at 667-668.

Defendant Joshun also argues that Moore's testimony regarding statements made by defendant Christian was inadmissible because the admission of Christian's statements violated

defendant Joshun's rights under the Confrontation Clause. Defendant Joshun concedes that there was no objection to the testimony on this ground at trial, leaving this issue unpreserved. He argues, however, that defense counsel was ineffective for failing to object. We find no merit to this issue. The Confrontation Clause of the Sixth Amendment prohibits the admission of "testimonial statements by a witness who does not appear at trial unless the witness is unavailable and the defendant had a prior opportunity to cross-examine the witness." *Yost,* 278 Mich App at 370, citing *Crawford,* 541 US at 53-54. In this case, defendant Christian testified at trial and was subject to cross-examination, thereby providing defendant Joshun with an opportunity to confront him. Accordingly, there was no Confrontaion Clause violation and defendant Joshun's counsel was not ineffective for failing to object on that basis.

Defendant Joshun also argues that defense counsel was ineffective for failing to object to the prosecutor's rebuttal argument regarding Turner's and Gatewood's statements. In part VII of this opinion, we rejected defendant Christian's claim that his counsel was ineffective for failing to object to the testimony concerning Turner's and Gatewood's statements, or to the prosecutor's arguments referring to that testimony. For the same reasons, we reach the same conclusion here with respect to defendant Joshun. Even assuming that defendant Joshun's counsel's failure to object could be considered objectively unreasonable, defendant Joshun has not met his burden of showing a reasonable probability that, but for counsel's failure to object, the result of the proceeding would have been different.

Defendant Joshun argues in a pro se Standard 4 brief that his equal protection rights were violated because he was prosecuted despite the absence of DNA evidence linking him to the crime. We find no merit to this issue. As the United States Supreme Court has explained, although DNA testing can provide powerful evidence, "DNA testing alone does not always resolve a case. Where there is enough other incriminating evidence and an explanation for the DNA result, science alone cannot prove a prisoner innocent." *Dist Attorney's Office for the Third Judicial Circuit v Osborne,* ___ US ___; 129 S Ct 2308, 2316; 174 L Ed 2d 38 (2009). In this case, although the prosecution's DNA expert admitted that there was no DNA evidence directly linking defendant Joshun to the charged crime, she also testified that the items she examined could have been handled without leaving detectable DNA. Further, other incriminating evidence was presented linking defendant Joshun to the offense. Specifically, Murphy, the assault victim, identified defendant Joshun as one of the shooters, and Moore testified that defendant Joshun made various inculpatory statements admitting his role in the offense. In addition, although defendant Joshun presented evidence that he was at the Terrace apartments when the shooting occurred, a clerk at the store that Person visited before the shooting testified that he saw defendant Joshun in the parking lot of the store approximately 20 or 30 minutes before the shooting. In sum, the absence of DNA evidence from the items examined did not preclude defendant Joshun's convictions.

Defendant Joshun also raises an issue in his Standard 4 brief that is directed at the prosecutor's impeachment of a prosecution witness, Harris, who was connected to the .38 caliber gun that was linked to the shooting. The prosecutor used Harris's prior statements to Sergeant Gaspar to impeach Harris's trial testimony that he did not give the gun to anyone before the shooting. Because there was no objection to the challenged testimony at trial, we review this unpreserved issue for plain error affecting substantial rights. *Carines,* 460 Mich at 763.

Defendant Joshun's reliance on *People v White*, 401 Mich 482; 257 NW2d 912 (1977), is misplaced because that case preceded the adoption of MRE 607, which permits a party to impeach its own witness. See, generally, *Stanaway*, 446 Mich at 692 n 51. This case is also distinguishable from *People v Pollock*, 21 NY2d 206; 234 NE2d 223 (1967), and *Fletcher v United States*, 332 F2d 724; 118 US App DC 137 (1964), because Harris here did not refuse to testify. Harris testified pursuant to a grant of immunity relative to the .38 caliber gun that he identified as belonging to his girlfriend. In sum, the prosecutor was permitted to impeach Harris with his prior inconsistent statement. Defendant Joshun has failed to establish that the testimony constituted plain error.

We also reject defendant Joshun's argument in his Standard 4 brief that defense counsel was ineffective for failing to have Harris's DNA tested. This claim fails because defendant Joshun has not presented any evidence that DNA testing of Harris could have provided a substantial defense. A defendant has the burden of establishing the factual predicate for his claim. *Carbin*, 463 Mich at 600. Further, the record discloses that defendant Joshun's counsel elicited from the prosecution's DNA expert that she did not receive a DNA sample from Harris for testing, and elicited from Sergeant Gaspar that she did not obtain a DNA sample from Harris for testing. Defense counsel then used this testimony to support an argument that the police investigation was inadequate. This strategy was not unreasonable under the circumstances. This Court will not find ineffective assistance of counsel merely because a defense strategy does not work. *In re Ayres*, 239 Mich App at 22.

To the extent that defendant Joshun also argues that there was insufficient evidence to support his convictions, we disagree. Murphy's identification testimony, Moore's testimony regarding defendant Joshun's inculpatory statements, and the evidence refuting defendant Joshun's alleged alibi, viewed in a light most favorable to the prosecution, was sufficient to enable the jury to find beyond a reasonable doubt that defendant Joshun committed the charged crimes. *People v Robinson*, 475 Mich 1, 5; 715 NW2d 44 (2006); *People v Gillis*, 474 Mich 105, 113; 712 NW2d 419 (2006); *Chapo*, 283 Mich App at 363-364.

X. DEFENDANT DARTANION EDWARDS'S OTHER ISSUES

Defendant Dartanion argues that the trial court erred in allowing Moore's testimony concerning statements made by defendant Christian to be used as substantive evidence against defendant Dartanion. In particular, defendant Dartanion challenges defendant Christian's statements that "Joshun's little brother" (Dartanion) talks too much and that "Bones" (Dartanion) had a problem with "Robert" before the charged offense because of a prior shooting at Dartanion's house. The trial court found that Christian's statements were admissible under the hearsay exception for statements against the declarant's penal interests, MRE 804(b)(3). Defendant Dartanion argues that defendant Christian's statements lacked insufficient indicia of reliability to be admissible under that rule. Although the trial court considered this issue in the context of defendant Dartanion's objection to the admissibility of notes taken by Moore regarding what he was told by defendant Christian, because the trial court considered the reliability of defendant Christian's out-of-court statements in its decision, we consider this evidentiary issue preserved for appeal. Accordingly, we review the trial court's decision for an abuse of discretion. *Unger*, 278 Mich App at 216.

Although reliability is a factor in determining the admissibility of a statement against penal interest under MRE 804(b)(3), the proper test for reliability requires consideration of the content and circumstances in which the statement was made. *People v Poole,* 444 Mich 151, 161; 506 NW2d 505 (1993); see also *People v Taylor*, 482 Mich 368, 378-379; 759 NW2d 361 (2008). Defendant Dartanion's reliance on the reliability analysis for analyzing a Confrontation Clause challenge, see *Poole,* 444 Mich at 165, is misplaced because that analysis is no longer good law. *Taylor,* 482 Mich at 378. Here, the trial court appropriately considered the content and circumstances of defendant Christian's statements to Moore, and defendant Dartanion has not established that the trial court erred in its analysis. The court did not abuse its discretion in allowing defendant Christian's statements to be used as substantive evidence against defendant Dartanion.

We also reject defendant Dartanion's argument in his pro se Standard 4 brief that defense counsel was ineffective for failing to object to the admission of Moore's testimony, or for failing to argue that the testimony should not be used against him at trial. As previously indicated, the record indicates that defense counsel objected to the evidence at trial. Further, defense counsel requested that the jury be instructed that Moore's testimony was not relevant to defendant Dartanion. Thus, there is no basis for concluding that defense counsel's performance was deficient with respect to these matters. *Jordan,* 275 Mich App at 667. The fact that defense counsel was not successful in his efforts to exclude the evidence or to limit its use against defendant Dartanion does not establish that counsel was ineffective. To the extent that defendant Dartanion argues that defense counsel should have also moved to exclude Moore's recorded conversations on the ground that Moore was functioning as a governmental agent, defendant Dartanion's failure to sufficiently address this claim of error, or show how he was prejudiced by the evidence, precludes relief. *People v Kelly*, 231 Mich App 627, 640-641; 588 NW2d 480 (1998).

Defendant Dartanion also argues that defense counsel was ineffective for failing to object to the prosecutor's introduction of Turner's and Gatewood's prior statements, and the prosecutor's closing arguments related to those statements. We rejected defendant Christian's similar argument in part VII of this opinion. We similarly reject defendant Dartanion's argument for the same reasons. Further, there is no reason to remand this case for a *Ginther* hearing with respect to this issue. MCR 7.211(C)(1)(a)(ii); *People v Ho,* 231 Mich App 178, 191; 585 NW2d 357 (1998).

Defendant Dartanion next argues that there was insufficient evidence to identify him as one of the individuals involved in the shooting. When considering a challenge to the sufficiency of the evidence, we view the evidence in a light most favorable to the prosecution to determine whether a rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. *Robinson,* 475 Mich at 5. Positive identification testimony may be sufficient to support a conviction. *People v Davis*, 241 Mich App 697, 700; 617 NW2d 381 (2000). In this case, Murphy's testimony identifying defendant Dartanion as one of the participants in the shooting was sufficient to establish defendant Dartanion's identity beyond a reasonable doubt. Although defendant Dartanion challenges the credibility and reliability of Murphy's identification testimony, we are required to view the evidence in a light most favorable to the prosecution, and this Court will not resolve questions of credibility anew. *Id.*

Defendant Dartanion also argues that the trial court erred in denying his motion for a new trial on the ground that the jury's verdict was against the great weight of the evidence. We review a trial court's decision to deny a motion for a new trial for an abuse of discretion. *People v Miller*, 482 Mich 540, 544; 759 NW2d 850 (2008). "A trial court may grant a motion for a new trial based on the great weight of the evidence only if the evidence preponderates so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand." *Unger*, 278 Mich App at 232. Conflicting testimony and credibility issues are generally insufficient to grant a new trial. *Id.* Rather, there must be extraordinary circumstances, such as testimony that contradicts physical facts or laws, is patently incredible or defies physical realities, or is so inherently implausible that a reasonable juror would not believe it. *People v Lemmon*, 456 Mich 625, 643-644; 576 NW2d 129 (1998). In this case, although defendant Dartanion presented an alibi defense, he has not established anything about the conflicting testimony or Murphy's identification testimony that demonstrates that the "evidence preponderates so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand." *Unger*, 278 Mich App at 232. The trial court did not abuse its discretion in denying his motion for a new trial.

Lastly, defendant Dartanion raises several issues in his Standard 4 brief that challenge the validity of his convictions, none of which have merit. To the extent that defendant Dartanion suggests that there was insufficient evidence to bring him to trial, the material question is whether the evidence at trial was sufficient to sustain his convictions. *Gillis*, 474 Mich at 113.

With respect to the first-degree murder conviction, defendant Dartanion incorrectly argues that the prosecutor was required prove that he fired the gunshot that killed Person. A person properly may be convicted of first-degree murder under an aiding and abetting theory of liability. *Robinson*, 475 Mich App at 6; *Carines*, 460 Mich at 759. With respect to the assault with intent to commit murder conviction, defendant Dartanion incorrectly treats the assault victim as Person. The victim of the assault offense was Murphy. Further, contrary to what defendant Dartanion argues, a conviction for assault with intent to commit murder does not require an actual physical attack. It merely requires an assault with the intent to kill, which would be murder if successful. *People v Ericksen*, 288 Mich App 192, 195-196; 793 NW2d 120 (2010). An intent to kill may be inferred from any facts in evidence. *Unger*, 278 Mich App at 223. An assault is an attempt to commit a battery or an unlawful act that places another in reasonable apprehension of receiving an immediate battery. *People v Johnson*, 407 Mich 196, 210; 284 NW2d 718 (1979). Here, Murphy's testimony that he saw all four defendants pull out guns, causing him to run, and that he heard multiple gunshots as he ran away, and the evidence that Person was fatally shot, viewed in a light most favorable to the prosecution, was sufficient to support both the first-degree premeditated murder conviction and the assault with intent to commit murder conviction. *Robinson*, 475 Mich at 5.

In addition, contrary to what defendant Dartanion argues, it was not necessary that the prosecutor produce the actual weapon used to kill Person to convict defendant Dartanion of carrying a concealed weapon. The offense merely required proof that defendant Dartanion carried a pistol concealed on or about his person. MCL 750.227(2); *People v Davenport*, 89 Mich App 678, 682; 282 NW2d 179 (1979). "Where conviction of an offense requires proof beyond a reasonable doubt that a defendant possessed a firearm, this element may be proven without the actual admission into evidence of the weapon." *People v Hayden*, 132 Mich App

273, 296; 348 NW2d 672 (1984). Lastly, there is no merit to defendant Dartanion's claim that the felony-firearm charge required proof that he had a prior felony conviction. A conviction for felony-firearm merely requires proof that the defendant possessed a firearm during the commission, or attempted commission, of a felony. MCL 750.227b; *People v Avant*, 235 Mich App 499, 505-506; 597 NW2d 864 (1999); *People v Beard*, 171 Mich App 538; 546; 431 NW2d 232 (1988).

Affirmed.

/s/ David H. Sawyer
/s/ Pat M. Donofrio
/s/ Amy Ronayne Krause